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### Evidence Problems in Criminal Cases

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## **Chapter 3**

### **EVIDENCE PROBLEMS IN CRIMINAL CASES**

**John W. Reed**

The Federal Rules of Evidence, enacted by Congress, became effective on July 1, 1975. Ten states have adopted state versions of the Federal Rules to govern trials in their courts, and about half the remaining states are considering whether to follow suit. Michigan is one of these latter states. Early in 1977 a committee appointed by the Supreme Court of Michigan proposed rules of evidence for Michigan closely patterned on the Federal Rules, and, if all goes well, the Court will promulgate rules for the Michigan courts to become effective in 1977 or soon thereafter. Michigan lawyers should be aware of the changes these proposed rules will bring about; some of them affect the problems covered in this chapter.

I urge you to acquire a pamphlet copy of the Federal Rules and the notes that accompany them. They are available inexpensively from the major publishers. Those Rules surely are the wave of the Michigan future. Moreover, the commentaries are extraordinarily valuable summaries of the law on the particular subject. Where a new rule has changed the law, the draftsmen have indicated what the law was before, to show what the change is. Where the rule is an embodiment—a codification—of the existing law generally, then that is so stated. The commentaries on the Federal Rules constitute one of the best quick-reference guides to the law of evidence. Additionally, the Michigan Committee's proposed Rules include "Impact Notes" that summarize prior Michigan law on each point.

### **Objections**

An objection to evidence need only state what the ground for the objection is. The general objection, i.e., one that does not state its ground, persists but is in disfavor. An important defect is that it almost never will serve as ground for reversal or new trial. In my view, a

general objection is nearly always the result of counsel's inability to identify the precise rule involved. It simply expresses a gut reaction that something is wrong. The attorney pushes his chair back, rises to his feet and clears his throat, to prevent the witness from answering until the lawyer can think what the objection really is. Meanwhile, still searching, he intones the words "incompetent, irrelevant and immaterial," or, as the Kansas lawyer said, "It's against all the rules of evidence that we've ever known in this court." But neither of these really tells what the objection is. Under the proposed Michigan rules, the objection need only make known the ground for objecting, there being no magic formula of words to be employed.

If the objection is sustained, the proponent should make an offer of proof. There are two reasons for an offer of proof. One is to indicate what the testimony would have been so that an appellate court can determine whether an erroneous ruling at that point constituted harmful error. The other reason is to provide the trial court with maximum information about the matter on which it has just ruled, in order that it may reconsider its ruling and be assured that it is the best one it can make at that point. Here the emphasis is on the trial court, not on the appellate court. Not infrequently, after a judge has sustained an objection, the proponent will make an offer of proof by stating, out of the hearing of the jury, the substance of the testimony that would come in as the answer to that question (or the witness is permitted to answer). The judge then says, "Oh, I see. If that's what you're getting at, I will allow the question and the answer." The jury is called back and the case proceeds. The more important function of the offer of proof, then, is to make the point of the question clear to the trial court so that its ruling may be based on a clear understanding of the situation.

Trial lawyers prefer the question-and-answer form of an offer of proof over counsel's summary. Almost every state allows both. I may say, "Your Honor, if permitted to answer [or "if you allowed him to testify"] the witness would say . . . ." Ordinarily this method suffices to communicate to the trial court what the real thrust of the evidence would be and

to inform the appellate court whether there has been harmful error. Tactically, in terms of persuading the judge, however, question-and-answer is better than summary.

### **The Motion in Limine**

Proposed Michigan Rule 103(c) provides:

In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

Although the phrase "motion in limine" does not appear in the Rule, it is the kind of procedure contemplated

Only in the last decade or so have lawyers begun frequently to seek preliminary rulings out of the hearing of the jury to preclude prejudicial questions and to exclude inadmissible evidence. Such rulings, given in response to a motion in limine, are particularly important in criminal cases. If counsel believes that highly prejudicial evidence will be offered against his client, he may make a motion at the threshold (which is the literal translation of a motion in limine), asking the court to rule that the adversary may not ask a question about that subject matter, may not introduce proof of that particular proposition, may not attempt to introduce in evidence a particular piece of demonstrative proof. A motion in limine should be made, for example, where there is a prior conviction of a witness and counsel believes that under the controlling law the evidence is inadmissible. Yet if there is a possibility that the court will rule otherwise, it may be tactically preferable not to call that party or witness to the stand. It is desirable and appropriate to raise the question with the court before deciding whether to put the witness on the stand, instead of trying to guess what the court will do about the matter in the middle of the trial. In short, counsel should consider asking at the beginning of the case for a ruling that will preclude certain lines of inquiry or offers of evidence that counsel believes inadmissible, the mere mention of which would be prejudicial.

Courts are not equally receptive to motions in limine. Some judges almost never grant them, saying, "I cannot answer this sort of question until I see it in context. Therefore I will not rule on it at this point." Others are willing to hear argument as to what the context will be and why it will be prejudicial, and to rule accordingly. Proposed Michigan Rule 103(c) encourages the latter (and better) approach.

### **Preliminary Findings of Fact**

Whenever the admissibility of evidence depends on the existence of some preliminary fact, the finding of that fact is generally for the judge, and the rules of evidence applicable in trials of lawsuits do not apply to the hearing on that issue. For example, the best evidence rule provides that if the contents of a writing are in issue, the original writing should be produced in court if available. Secondary evidence is admissible only if the original is not available through no fault of the proponent. Assume that the proponent offers a copy and argues that it can come in because the original has been destroyed by an accidental fire. The adversary responds, "It hasn't been destroyed. It still exists." The finding whether the original exists is for the judge, not the jury. The procedure is to have a hearing on that issue at that point in the trial, with both parties being heard.

Proposed Rule 104(a) provides that "[i]n making its determination it [the court] is not bound by the rules of evidence except those with respect to privileges." Thus, hearsay evidence and some opinion evidence might be admissible—a letter, for example, stating what happened. The important point is that the fact determination is for the court and not the jury. After the "mini-trial" and the court's ruling, the trial on the principal issue resumes.

There is a little-understood and confusing exception to this in Proposed Rule 104(b):

When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Let me illustrate. Assume an ordinary case in which a letter is involved. The proponent offers some penciled notes about the content of the letter, and the adversary objects that the notes are not the best evidence and seeks to keep them out. The proponent responds, "But the original has been lost through no fault of my own." At this point the trial court is to hear both sides of the issue of the whereabouts of the original. The judge makes a bench decision to admit the copy or not, based on a preponderance of the evidence on the question. That situation is to be distinguished from a 104(b) situation like the following. A beneficiary sues an insurance company on a policy. The insured offers evidence at the trial that he sent the original of the policy to the company for reformation because of an error in it, that the company never returned it to him, and that as a precaution he made a handwritten copy of the policy, which he seeks to introduce. The defendant company denies that it ever issued such a policy. Although this situation is superficially like that in the earlier case—calling for a preliminary finding of unavailability as a condition of admissibility of the copy—the courts generally hold that the issue in such a case is for the jury, not the court, and that, instead of hearing both sides of the issue at that point in the trial, the court should require only a prima facie showing of the existence of the original and its unavailability, leaving to the defendant the presentation of counter-proof during the presentation of its case-in-chief.

The two kinds of cases are distinguished from each other by the fact that in the former case, the competency of the evidence, under the best-evidence rule, is in issue, and that determination (and a decision on the facts precedent to it) is for the court. In the latter case, however, if there was no original policy, plaintiff has no case—indeed, is attempting to defraud. The existence of the policy is "the very foundation and substratum" of the case (to quote the landmark case on the issue); and if there was no original policy, the ostensible copy is, in a technical sense, irrelevant. In such a case, all that is required as a condition of admissibility is the introduction of evidence "sufficient to support a finding of the fulfillment of the condition." Proposed Michigan Rule of

Evidence 104(b). Additionally, Proposed Rule 1008 addresses the problem directly:

[W]hen an issue is raised . . . whether the asserted writing ever existed, . . . the issue is for the trier of facts to determine as in the case of other issues of fact.

The important procedural consequence of all this for the lawyer is that in the case of ordinary preliminary findings of fact, the adversary may cross-examine and may offer contrary evidence on the existence of the preliminary fact, with the court then making the appropriate determination. But when relevancy is conditioned on fact, the court does not hear both sides; it hears only the proponent and determines whether there is enough evidence to support a finding of the condition. The adversary must await the presentation of his case-in-chief to present his side of the controversy as to the condition.

### **Scientific Evidence**

Of the problems presented by scientific evidence, a majority seem to be created by counsel's forgetting or ignoring fundamentals. The rules controlling the admissibility of scientific evidence are simply particularized versions of familiar rules of evidence, primarily those having to do with relevance.

There is a tendency to be overawed by the scientific aspect of this kind of proof. All too often lawyers are as bemused as jurors by the mystique surrounding the men of science and their scientific equipment: black boxes, meters, graphs, buzzers, test tubes, computer printouts. But the great god of science is not omniscient, and on occasion it has feet of clay. Characterizing something as scientific does not render inapplicable the various rules concerning relevance, opinion, hearsay and witness competency. Scientific evidence is not some kind of exotic proof out of another world.

The most important issue in the admissibility of particular scientific evidence is nearly always relevancy. The proponent must show a connection between the evidence offered and the inference sought—the

conclusion desired. Proposed Michigan Rule 401 (like its federal counterpart) provides that

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

If it is determined that evidence is relevant under that test, consideration then must be given to proposed Rule 403, which provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In short, the logical strength of the evidence is balanced against the counterweights, and the judge makes a discretionary ruling as to admissibility in context. The admissibility of scientific evidence calls for that general, three-step process: determining relevance, identifying the dangers, and weighing the one against the other, with the balance tipped (the phrase is "substantially outweighed") in favor of admissibility. Let us apply the process to illustrative kinds of scientific evidence.

As a condition of admissibility, it is necessary to show the validity of the general scientific proposition involved and of particularized applications. A familiar example is speed measurement by radar. At the beginning of the use of this kind of evidence, it was necessary to persuade the court to accept the validity of the Doppler effect for measurement of motion. You will recall from high school physics that the pitch of sound changes as the source of the sound approaches and passes the hearer, as with the sound of race cars as they go past the microphone on the track, with the pitch changing from high to low. Physicists will testify to the validity of the principle, and it can be illustrated very simply.

The next step is to get the court to accept radar as a particularized application of the Doppler principle, which may be done in any of three ways. First, the court may take judicial notice of principles that are common knowledge or are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."



Proposed Michigan Rule of Evidence 201(b). Judicial notice is more appropriate to, and therefore more commonly taken of, general principles than specific applications: for example, the general principle of blood alcohol as distinguished from particular measuring devices such as drunkometers and Breathalyzers; the Doppler effect rather than a given radar instrument; stress evaluation rather than a particular polygraph. But through the years even particular devices—as a class—can become judicially noticed. Now, of course, we find courts judicially noticing the validity of radar measurement of speed.

A second method of establishing the relevance of scientific principle and of particularized applications is through testimonial evidence, typically that of an expert, who, being sworn, explains to the court the principles and techniques and devices involved. The expert must first be qualified by "knowledge, skill, experience, training, or education." Proposed Michigan Rule 702. Additionally, however, in the field of scientific evidence there is the requirement that the principle to which the expert testifies have achieved general acceptance in the scientific community. As stated in the leading case, Frye v United States, 293 F 1013, 1014 (CA DC 1923):

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

The important words are "general acceptance." Whatever the phrase means, it does not mean unanimity of approval. A 1958 California case, People v Williams, 331 P2d 251 (1958), approved a test for narcotics use that apparently was accepted by only a small segment of the medical profession. Said the court, "In this age of specialization more should not be required." Id at 254.

Under Williams, all that is required is that the principle be accepted by those who would be expected to be familiar with it. This presents an especially difficult problem in cases involving innovative procedures

and newly discovered principles. For example, there is currently much discussion about "voiceprints," more formally known as spectrographic voice analysis. Judicial attention was first given to voiceprints in 1966. The numerous cases around the country since that date dealing with this scientific technique apparently have involved foundation testimony by the same seven or eight experts—almost a traveling troupe of people who know something about it. The question is, can there be "general acceptance" of a principle that has only a handful of proponents?

It is a fair reading of the cases generally that a mere individual opinion in support of a principle or particular application is insufficient. There is one decision, however, that permitted evidence on the endorsement of a single scientist—the famous Coppolino case. Coppolino v State, 223 So 2d 68 (Fla App 1968), app dismissed, 234 So 2d 120 (Fla 1969), cert denied, 399 US 927 (1970). Therein a doctor testified that, contrary to the general view, the presence of the poison known as succinylcholine could be detected in human tissue, and that he could detect it himself. He said he had found such poison in the body of the decedent. The court admitted the testimony for the jury to deal with as it wished. I believe the Coppolino case to be alone in such a holding.

Although courts tend to be slow to accept new scientific principles, there have been occasions on which they apparently have moved too quickly, endorsing procedures later shown to be invalid or untrustworthy. Then it becomes necessary to pull back. For a period of time courts approved and admitted evidence of the results of the paraffin test to detect the presence of nitrates on the hands of an individual who allegedly fired a gun. Now, however, it is known that numerous other substances besides the nitrate from gunpowder will produce an affirmative response to the test, and courts no longer admit the results of such a test. The paraffin retreat suggests that, though it may be important for courts to make use of the forensic sciences, it is important that they not rush to judgment in uncritical acceptance of the principles endorsed by only a few, or principles that have been inadequately tested or explored.

The third method of getting a court to accept a scientific principle as relevant combines judicial notice and hearsay. I refer to the use of a book to establish the principle, its acceptance, and possibly its application. Traditionally, articles and treatises could not be so used

because of the obvious hearsay objection. Proposed Michigan Rule 803(18), however, contains the following broadening exception to the hearsay rule:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .  
(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in public treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

In short, treatises and articles will be admitted under the rule as substantive evidence, provided they are called to the attention of the expert on cross-examination or relied on by him in direct. Counsel may have available a witness who can barely qualify as an expert, with limited ability in the field. The foremost authority on the subject is in southern California or some other distant place, and the budget for the case will not permit bringing in that expert. If, however, he has written a book with the desired language in it, it may be admissible on the endorsement of the low-wattage expert called to the stand.

At this point a word of caution is in order. It is important to understand clearly what the experts are saying, and the trial lawyer needs to be both skeptical and careful. Consider, for example, the use of neutron activation analysis—a method of chemical analysis that involves bombarding a questioned substance with some kind of radioactivity and then taking a readout from it to be compared with the readout of a similarly bombarded exemplar or known substance. All that the NAA test can show is that the questioned substance is indistinguishable from the exemplar. It does not necessarily show that it is from the same source. For example, suppose that the police have a paint chip taken from the clothing of the decedent in a hit-and-run case and the chip is shown by NAA to be indistinguishable from a paint chip taken from the defendant's car. The relevance of that evidence depends on the number of cars with the same

kind of paint. If there are hundreds or thousands, the significance is slight indeed, but if only two customized cars are known to have that kind of paint, the relevance is great.

Moreover, one must be sure that the supporting assumptions are valid. In the NAA field, for example, there is a popular assumption that testing of hair samples is highly relevant to identity. The famous John Norman Collins case that occurred in Ann Arbor a few years ago relied heavily on NAA testimony with regard to hairs found on and in the body of the victim, and hairs found on the basement floor of the house where allegedly the victim had been with the defendant. The assumption is that each person's hair always has the same characteristics, but that assumption is now known to be myth only; hairs from one person vary widely in composition. Indeed, they vary so much that sometimes the variation between hairs taken from one person's head is greater than the variation between hairs taken from different people. That being true, there is limited statistical significance in finding that a hair from the defendant's head matches the hair clutched in the victim's hand.

Counsel cannot afford to be bemused by the science and neglect to ask what it is that the science is supposed to establish in the case.

After the scientific evidence has been shown to be relevant because the procedure is valid, the next step is to identify and to weigh the "costs" of introducing the evidence, as set forth in Proposed Michigan Rule 403. Counsel may argue that the evidence, though relevant, will, for example, be overvalued—given more weight by the fact finder than is warranted. An excellent illustration is the lie detector or polygraph. There is no doubt that under the standard tests of logical relevance—whether the evidence makes a fact more or less probable than the fact would be without the evidence—a polygraph test, with proper foundation testimony, would be relevant as bearing on the credibility of the person subject to the test. Indeed, the test is more reliable than many other kinds of evidence admitted without the slightest hesitation. The difficulty is that whatever the reliability may be, probably less in application than in theory, the jurors may, by the apparent objectivity and almost magical

aura of the device, be persuaded to a position of near certainty, whereas the rational force of the results ought to be significantly less than that.

This element of overpersuasion inheres in much of scientific evidence and must always be taken into account by the court in determining whether to admit a particular kind of proof. By the same token, effective advocacy by counsel seeking to admit or to bar scientific evidence will call for arguments directed not alone to the scientific validity of the principles and devices involved but also to the nonrational, emotional effect of the evidence.

After the scientific principles have been established, counsel next must offer evidence that the method was properly used on the particular occasion. The technician who operated the device must meet a standard of competence, and there must be testimony as to the good working condition of the device used on this occasion. In addition, if a substance has been tested by the use of a device (for example, a blood sample), there must be chain-of-custody proof.

In the early days of judicial use of a scientific device or principle, the witnesses offered to establish its validity tend to have relatively high competence. For example, when radar was first used to test speed, physicists came to court to testify about the principles involved. Now, of course, the patrolman who operated the particular radar device is allowed to come into court and to testify to the results of its use, the court having taken judicial notice of the Doppler effect and of radar as a particular application. The relatively unsophisticated technician can testify to the good condition of the particular device and his reading of it as the defendant's car approached. But if the theory needs to be challenged in the particular case, cross-examination of the technician is almost useless. In a Colorado case, the position of the defendant was that he had been going through a curve when he was measured, and he maintained that the device is not accurate on a curve. There is, indeed, something to that argument, although any error created thereby was probably in the defendant's favor, since radar tends to register slower than the actual

speed on a curve rather than faster. In any event, he wanted to raise that question, and his lawyer was trying to cross-examine the patrolman about the problem. The patrolman had not the slightest idea what the lawyer was talking about, and the cross-examination was ineffective as a consequence. As lower-level technicians come into court with more and more familiar devices, it becomes harder to go into the possibility of any improprieties or technical failings. In a very important case, counsel may have to summon his own expert to raise the question.

### **Hearsay**

Proposed Michigan Rule 801(c) defines hearsay as follows:

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

The critical phrase is "offered . . . to prove the truth of the matter asserted." If not so offered, the statement is not hearsay. For example, a statement that constitutes part of the crime is not hearsay, as when a victim seeks to testify that while he was waiting for the bus he felt a gun in his back and heard a voice saying, "This is a stickup." That is not hearsay. The statement is not offered to prove that because the speaker believed it was a stickup, it was in fact such a crime. The words themselves were part of the criminal act.

A slightly more difficult situation involves statements offered to show the giving of notice or to indicate in some other fashion a relevant awareness on the part of the hearer. The point is illustrated by a federal case arising in California, charging use of the mails to defraud. An individual had been marketing a device alleged to be useful to find oil deposits. The device, somewhat like a Geiger counter, would supposedly respond when the person carrying it walked over the point at which one should drill for oil. At the trial, the defendant testified that before he marketed the device he submitted it to a couple of friends—a petroleum geologist and a petroleum engineer who, having examined the device, told him that it would do what he claimed for it. The prosecutor objected on

the ground that it was hearsay. But defense counsel, being bright and creative, said, "But, Your Honor, we're not offering this to prove the device will work. This is a charge of using the mails to defraud. Fraud requires a false statement knowingly made with intent to deceive. What my client heard about his device is relevant to his state of mind at the time. It is therefore admissible on that issue of the alleged crime." The trial judge said, "You're right. It's admissible not to prove that the device will work, but to prove that you thought it would work when you heard the statement. It gave you notice on which you were acting."

A similar and more familiar illustration is the message received by a policeman on his squad car radio: "Be on the lookout for a suspect in a filling station holdup at First and Main Streets. Suspect is a white male, six feet, two hundred pounds, about forty years old, wearing green overcoat and black hat." The patrolman sees such a person and arrests him. If the issue at the hearing is the legitimacy of the arrest, the testimony about what he heard on the radio is not hearsay; it is offered not to prove that the person who held up the filling station had these characteristics, but to prove on what information the policeman acted, thus bearing on the reasonableness of his action in making the arrest and, therefore, its legality. If, however, the policeman testifies at the trial that he heard that the person who held up the filling station had those characteristics and that he arrested this defendant, who had these characteristics, then the testimony would be inadmissible because it is offered to prove the truth of the matter asserted and is therefore hearsay—probably second- or third-hand. That is, someone called the police station, the police station telephone operator wrote it down and handed it to a dispatcher, and the dispatcher put it on the air. There are thus several levels of hearsay.

To repeat, statements are not hearsay if they are offered, not to prove the truth of the statement, but for some other relevant purpose in the trial. Many lawyers automatically object to the offer of evidence of what someone said, claiming that it is hearsay. Remember that it is not hearsay if it is offered for a purpose other than its truth. In the fraud case example, it is offered for its bearing on the defendant's knowledge,

known as scienter; in the legitimacy-of-arrest case, it is offered for its bearing on the reasonableness of the officer's actions. But in the criminal trial on the issue of the accused's guilt, the radio message would of course have no relevance except to prove the truth of the statement, in which event it clearly would be hearsay.

### Prior Identification

Admissibility of prior identification testimony has been somewhat uncertain; but Proposed Michigan Rule 801(d)(1), like the equivalent federal rule, makes such testimony admissible as follows:

A statement is not hearsay if—

. . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (C) one of identification of a person made after perceiving him; . . . .

Such testimony has been held admissible even without statutory authorization. In United States v Barbati, 284 F Supp 409 (EDNY 1968), a barmaid received a bill in payment for drinks and took it to the cashier. She and the cashier decided that it was probably counterfeit, and the manager hailed a passing police car. The barmaid identified the person who had given her the bill; he was arrested and ultimately charged under federal law with passing counterfeit money. At trial, the barmaid testified that the bill had been given to her and that she had pointed out the man who had given it to her, but she could not now identify the defendant as the one who had given her the bill in the bar. The policeman testified, however, that the defendant was the one pointed out to him by the barmaid. Judge Weinstein suggested that the policeman's testimony might be analogized to chain-of-custody evidence, and he said, 284 F Supp at 411:

The analogy will become clearer by assuming the case of a blind man who feels a pickpocket taking his wallet. Assume he seizes the thief, holds him, and calls for help and that a policeman comes by immediately and arrests the man being held. No one would apply the hearsay rule to prevent the identification even though the blind man would not be able to recognize the defendant at the trial. His testimony plus that of the arresting officer would suffice.



Nevertheless, the court went on to hold that even if the prior identification proof were deemed hearsay (which analytically it undoubtedly is), it should be received as an exception.

When Rule 801(d)(1)(C) was proposed in the Federal Rules, congressional reaction was that the practice would be very dangerous. Senator Ervin, the principal antagonist, argued that a defendant might be convicted solely on the basis of such an out-of-court identification. When Congress enacted the Federal Rules, clause (C) was omitted. After Senator Ervin's retirement, however, Congress amended the Federal Rules by adding clause (C); the Proposed Michigan Rule includes that clause. As a practical matter, an early identification is frequently better, being fresher, than a courtroom identification.

### **Business Records**

Since 1975, business records have been admissible in criminal cases in Michigan. People v Chambers #1, 64 Mich App 311; 236 NW2d 702 (1975). The Proposed Michigan Rule on business records, like the federal rule from which it is drawn, is quite broad. Rule 803(6) makes admissible records not only of "acts, events, [and] conditions," but also of "opinions, or diagnoses"—a substantial enlargement of the admissibility of business records. Traditionally, a doctor's diagnosis in a hospital record has not been admissible as a business record. Assume a homicide case in which the victim was brought into the emergency room of a Detroit hospital, where he expired. On duty in the emergency room was an intern from New Delhi. By the time the case comes to trial, he is in India. To prove the cause of death, the prosecutor offers the emergency room record, properly authenticated, with the intern's statement "expired because of gunshot wound," or the like. Under traditional law, that part of the record probably would not be admissible, but Rule 803(6) would authorize its reception. Accordingly, the new rule will considerably enlarge the admissibility of business records in the criminal area, where injuries or death are frequently in issue.

### **Police Reports**

Police reports are generally understood to be admissible as exceptions to the hearsay rule as either business records or official records.

Rule 803(6), (8). (Under some circumstances, of course, police reports are rendered inadmissible by statutes creating a kind of privilege.) But hearsay admissible under an exception is ordinarily admissible only to the extent that the declarant could have testified had he been on the witness stand himself. That means that if there are two or more levels of hearsay, there must be an exception for each level. Rule 805. In other words, hearsay within hearsay is admissible only if each part of the combined statement conforms with an exception to the hearsay rule.

The classic illustration is Johnson v Lutz, 253 NY 124; 170 NE 517 (1930), in which the court held that an accident report would be admissible, thus excusing the presence of the policeman-author at the trial, but only to the extent that the policeman himself could have testified were he on the witness stand. Thus, if he measured the skid marks, the record entry would be admissible. If he recorded the condition of the pavement, the weather, the location of the cars at the time he arrived, whom he dispatched to what hospital, he could testify to all those things if he were in court, and the record can be used to prove those same facts, as an exception to the hearsay rule. But if he recorded a bystander's statement, that part of the record would be inadmissible because he would not be permitted to testify to the substance of the statement were he on the witness stand. If, however, he recorded a statement from one of the drivers constituting an admission (for example, "I didn't see the red light"), that statement would be covered by an exception to the hearsay rule (or defined as nonhearsay under the Proposed Rules), and would come in. Each level of hearsay is covered by an exception: admission for the driver's statement, and business record for the policeman's statement.

### **The Use of Memoranda on the Witness Stand**

Policemen on the witness stand often use their reports to refresh their recollections. On occasion it is apparent that it is not truly a refreshing of recollection, but the reading of an old report about which the policeman has no present recollection. In such an instance, "refreshed recollection" is simply pretense and counsel should take issue with it, asking to have the report withdrawn, if necessary, once the policeman has looked at it to refresh his recollection. If he cannot state the details without looking at the record, the issue becomes one of whether it is

admissible as an exception to the hearsay rule for past recorded recollection, as a business record, with appropriate foundation proofs. Rule 803 (5), (6), (8).

### Former Testimony

There is an increasing willingness to use prior testimony from civil cases in criminal cases and vice versa. The frequent illustration is the arson situation in which there is a lawsuit for the insurance proceeds and an arson charge against the insured. Can testimony from one case be used in the other if the witness has subsequently become unavailable? The language of Proposed Michigan Rule 804(b)(1) is instructive:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . Testimony given as a witness at another hearing of the same or a different proceeding, . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Without such a rule, Michigan criminal cases have excluded former testimony given in a different proceeding. People v Johnston, 328 Mich 213; 43 NW2d 334 (1950); People v DeWitt, 233 Mich 222; 206 NW 562 (1925). The 804(b)(1) language quoted above is, obviously, not so limited; but the Michigan decisions are grounded on defendant's right of confrontation, which will apply also under the Proposed Michigan Rule. Accordingly, the new rule may not be functionally inconsistent with prior Michigan law in this respect. But if we move from the criminal case first to the civil case second, it should be easy to find that there was, indeed, an opportunity and similar motive "to develop the testimony by cross-examination"; and without the confrontation problem in the civil case, the prior testimony will be admissible.

### Third-Party Confessions

Traditionally, third-party confessions ("declarations against penal interest") have been inadmissible hearsay, covered by no exception. The

common law's hostility to these statements arises out of the circumstance that they are typically offered by an accused as exculpatory and are thought to be too easy to fabricate. The United States Supreme Court, in Chambers v Mississippi, 410 US 284 (1973), indicated, however, that in a proper circumstance refusal to receive third-party confessions could be a denial of due process. In 1976, the Michigan Supreme Court held such declarations against penal interest to be admissible as an exception to the hearsay rule, People v Edwards, 396 Mich 551; 242 NW2d 739 (1976), and that is the rule under both the federal statute and the proposed Michigan rule. Rule 804(b)(3). Skepticism about the reliability of third-party confessions continues and accounts for the requirement in Federal Rule 804 that such a statement is not admissible "unless corroborating circumstances clearly indicate the trustworthiness of the statement." The Michigan Supreme Court, in the Edwards case, did not follow suit, expressly rejecting the requirement of corroborating circumstances. What rule the Court adopts as part of the Michigan Rules of Evidence remains to be seen.